FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Second Appeal No. 121/2007
(Sindhubai Shankarlal Chandravanshi & 4 others **VERSUS** Jagdish Raojibhai Kothari & 3 others **)**

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri Gandhi, Advocate for the appellant.
Shri Purohit, Advocate for the respondent no.3.

CORAM : Smt. Vasanti A. Naik, J.
DATE : 6th September, 2007.

Heard the learned counsel for the parties.

The appellants are the original defendants. A suit was filed by the respondents/ plaintiffs for declaration, permanent and mandatory injunction and for recovery of damages against defendants/appellants. It was the case of the plaintiffs that they have title and interest over the open space which is the suit property on the east and north of the house property. According to the plaintiff, the defendant had started illegal and unauthorised construction in the open space, and therefore, they be restrained from making the said construction and use of the open space. Certain other reliefs were also sought by the plaintiffs in the said suit.

The defendants/appellants filed the written statement along with the counter claim. They denied

the claim of the plaintiff. It was pleaded by the defendant in their counter claim that they had an absolute right over the suit open space and the plaintiffs had obstructed them from peaceful enjoyment of their property by carrying out the illegal and unauthorised construction over the suit property. The defendants further pleaded that the plaintiffs had no right to use the northern open space as the way. The plaintiff filed the written statement to the counter claim and also filed an application for deciding issue no.8 which pertained to the counter claim as a preliminary issue. The issue was whether the counter claim was barred by the principles of Res-judicata.

The trial Court, after hearing the parties and after considering the plaint in the previous suit and the judgment rendered by the trial and the appellate Court therein as also the pleadings in the written statement and the counter claim, held that the counter claim was liable to be dismissed as it was hit by the doctrine of Res-judicata. Being aggrieved by the aforesaid order dated 14.02.2006, the defendants preferred an appeal

before the Ad-hoc District Judge, Nagpur. By the judgment dated 09.11.2006, the order passed by the trial Court on 14.02.2006 was upheld. The first appellate Court, for the reasons recorded in writing, dismissed the appeal filed by the defendants with costs. The first appellate Court held that the relief sought by the defendants in the earlier litigation as well as in the counter claim was the same. The first appellate Court held that the defendants had in the earlier suit prayed for a declaration that the plaintiffs herein had no right to carry out any sort of construction on the open space owned by the present defendants and the plaintiffs herein may be directed to remove the construction made on the defendant's land. In the instant proceedings, by filing the counter claim, it was pleaded by the defendants that in view of the construction made by the plaintiff which was illegal and unauthorised, their easementary rights were affected. The first appellate Court observed that the construction was already completed during the pendency of the earlier proceedings and the relief was also sought for

its removal and in the instant suit by filing the counter claim, the defendants were seeking a similar relief, though consequences of making the alleged illegal construction were additionally pleaded in the counter claim. The first appellate Court upheld the finding recorded by the trial Court that the matter involved in the counter claim was directly and substantially in issue in the earlier suit filed by the defendant, bearing no.1336/1991. The appellate Court further proceeded to add that the defendants could have also pleaded in the earlier suit that in view of the illegal construction carried out by the plaintiffs herein, their easementary rights were affected. However, that was not done. The first appellate Court held that the defendants were precluded from seeking a relief on the basis of the violation of their easementary rights since it was barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure as the same could have been pleaded by the defendants in the earlier civil suit filed by them in the year 1991. Both the Courts have recorded a concurrent finding of fact that the issue

involved in the earlier suit i.e. Regular Civil Suit No. 1336/1991 and the one involved in the counter claim filed by the defendants was the same, and therefore, the counter claim filed by the defendants was hit by the doctrine of Res-judicata.

I have perused the copy of the plaint in Regular Civil Suit 1336/1991 and the judgments rendered in that suit. I have also perused the pleadings of the counter claim in this suit. The earlier suit was not only decided on the question of tenability but, was also decided on merits. It is clear that the findings recorded by both the Courts are based on a proper appreciation of the pleadings in the earlier suit, the judgment referred in the earlier suit as also the pleadings in the counter claim filed by the defendants. The findings being pure findings of fact and do not give rise to any substantial question of law. The judgments reported in AIR 1993 SC 1756, AIR 1995 SC 2001, AIR 2004 SC 508 and AIR 1976 SC 1569 are totally inapplicable to the facts of this case. Some of the decisions merely lay down the conditions which are

necessary for proving the the subsequent suits are barred by the principles of Res-judicata. On the facts and the pleadings in the earlier suit and the counter claim filed by the defendants herein, the Courts have recorded a finding that the issue involved in the earlier suit and the counter claim are the same. For the reasons aforesaid, the second appeal fails and is dismissed with no order as to costs.

JUDGE

APTE